

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

William Louis Huff,
Petitioner,
vs.
Charles L. Ryan, et al.,
Respondents.

No. CV 11-0773-TUC-FRZ (BPV)

**REPORT AND
RECOMMENDATION**

On November 30, 2011, Petitioner, William Louis Huff, an inmate confined in the Arizona State Prisons Complex – Lewis in Buckeye, Arizona, filed a *pro se* Petition for Writ of Habeas Corpus by a Person in State Custody, pursuant to Title 28, U.S.C. § 2254. (Doc. 1)¹

The District Court screened the petition and denied Petitioner's request for damages, but ordered the Petition served on Respondents. (Doc. 5) Respondents have filed an answer to the Petition (Answer) with exhibits A through B attached. (Doc. 10) Petitioner filed a reply (Reply) with several exhibits attached. (Doc. 12) Additionally, Petitioner has filed an "Amendment to Complaint," (doc. 11), A "Request to Make Supplemental Addition to Exhibits," (doc. 13), a letter requesting permission to allow statements (doc. 15), a "Request to Submit Letter for Filing Purposes," (doc. 16), and a "Request to Submit Psychological Report" (doc. 17).

Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate Judge Bernardo P. Velasco for a Report and Recommendation.

¹ "Doc." refers to the documents in this Court's file.

1 For the reasons discussed below, the Magistrate Judge recommends that the
2 District Court enter an order DISMISSING the Petition as untimely

3 **I. FACTUAL AND PROCEDURAL BACKGROUND**

4 **A. Conviction, Sentencing and Appeal**

5 Petitioner pled guilty to second-degree murder in 1967 and was sentenced to a
6 prison term of 40 years to life. (Doc. 1, at 2)² No appeal was taken from the judgment of
7 conviction. (Doc. 1, at 2-3)

8 **B. Parole Proceedings**

9 Petitioner asserts that, in 1982 he was paroled to the custody of the Federal Bureau
10 of Prisons (BOP). (Doc 1, at 6) In 1983, the BOP set a presumptive parole date of June
11 28, 1984, and notified the State of Arizona of Petitioner's imminent release, in order to
12 allow the State to set a "street parole hearing," *i.e.*, assign a parole officer, set conditions,
13 and to allow for dual supervision. Petitioner alleges that he received State approval for
14 parole, and, accordingly, the BOP released Petitioner on December 18, 1983, to a
15 halfway house where he stayed for 4 ½ months. (Doc. 1, at 6) Petitioner states that in
16 April, 1984, he was charged with a "minor infraction" of his parole, and returned to
17 federal prison, but contends he was found "not guilty" by the parole commission, and was
18 released to a halfway house again in November, 1984. (Doc. 1, at 7) While Petitioner was
19 in Oklahoma, and unbeknownst to him, Tucson residents became outraged after a parolee
20 killed a Tucson child and a citizen watchdog group titled "We the People" became active
21 concerning parole of inmates. Upon returning to the halfway house from Oklahoma,
22 Petitioner resumed his programs – he secured employment at the airport and participated
23 in counseling, while his brother and his wife supported Petitioner. Petitioner became
24 eligible for furloughs and was allowed to visit his parents in Sierra Vista, Arizona on
25 Christmas Day. The Sierra Vista police were notified of Petitioner's visit. At some point,
26 apparently after his return from Sierra Vista, Petitioner was questioned by a Pima County

27 ² Respondents have asserted that, "due to the age of this case, counsel ... have
28 been unable to locate any state court records pertaining to Petitioner's case." Respondents
do not contest the procedural background of Petitioner's conviction, sentence or appeal,
as provided by Huff in the Petition.

1 Sheriff's Deputy about the halfway house. Two days later, U.S. Marshals took Petitioner
2 into custody because of a "mix-up in paperwork." (Doc. 1 at 8.)

3 Petitioner claims that his return to custody was actually the result of community
4 outrage and public outcry demanding the removal of offenders who were convicted of
5 violent offenses following a tragic crime committed by another individual while on
6 parole. (Doc. 1, at 7-8) Petitioner claims that in the 26 years following this revocation the
7 Board of Executive Clemency, politically motivated and acting vindictively in retaliation
8 for Petitioner's claims that his parole was wrongfully revoked, uses "various reasons
9 now, other than that for which he was violated for," including the wrongful retroactive
10 application of new laws to continue to deny Petitioner parole. (Doc. 1, 7-9)

11 Petitioner asserts that he raised his claims in an "informal petition" filed in the
12 Arizona Court of Appeals on June 10th or 12th, 2011, explaining that his "first petition
13 was informally written in letter form requesting a review of [his] case, concerning the
14 Arizona Board of Executive Clemency" and requested relief on the grounds of "due
15 process, presumption of vindictiveness, cruel and unusual punishment, [violation of] . . .
16 civil rights, applying new laws in this case, increasing [Petitioner's] incarceration. (Doc. 1
17 at 4-5) This "application" was denied. (*Id.*)

18 C. Federal Habeas Petition

19 Petitioner raises four grounds for relief. In Ground One, Petitioner alleges that he
20 is currently incarcerated due to the denial of due process in connection with revocation of
21 parole granted in 1985. In Ground Two, he alleges that "Parole Board members"
22 vindictively and in a retaliatory and racially discriminatory way extended his
23 incarceration for pre-textual reasons. In Ground Three, Petitioner alleges that the Arizona
24 Board of Executive Clemency has violated his Eighth Amendment right not to be
25 subjected to cruel and unusual punishment by retroactively applying new criteria in new
26 parole hearings. In Ground Four, Petitioner alleges that the Arizona Board of Executive
27 Clemency has violated the *Ex Post Facto* Clause of the Constitution by applying laws
28 that were not in effect at the time he was convicted and sentenced. (Doc. 1, at 6-9)

II. DISCUSSION

A. Standard of Review

Because Huff filed his Petition after April 24, 1996, this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) (“AEDPA”).

B. Timeliness

Under the AEDPA, a one year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. 28 U.S.C. § 2244(d)(1). Respondents assertion that the petition is untimely under 28 U.S.C. § 2244(d)(1)(A) based on the date the judgment became final is erroneous. Because Huff is challenging a parole revocation decision, the limitation period begins to run on “the date on which the factual predicate of the claim ... presented could have been discovered through the exercise of due diligence.” § 2244(d)(1)(D); *see Redd v. McGrath*, 343 F.3d 1077, 1082 (9th Cir. 2003) (applying § 2244(d)(1)(D) to parole denial claim with time running from date of parole decision); *Wade v. Robinson*, 327 F.3d 328, 333 (4th Cir. 2003) (same with respect to parole revocation); *Cook v. New York State Div. of Parole*, 321 F.3d 274, 280 (2nd Cir. 2003) (same).

The running of this one-year statute of limitations on habeas petitions for state convictions is tolled during any period when “a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending” in any state court. *See* 28 U.S.C. § 2244(d)(2). An application contemplated by section 2244(d)(2) is properly filed “when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.” *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (footnote omitted). The United States Supreme Court has held that untimely state post-conviction petitions are not “properly filed” under AEDPA, and do not toll AEDPA's statute of limitations. *Pace v. DiGuglielmo*, 544 U.S. 408 (2005).

The Ninth Circuit recognizes that the AEDPA's limitations period may be

1 equitably tolled because it is a statute of limitations, not a jurisdictional bar. *Calderon v.*
2 *United States Dist. Ct.*, 128 F.3d 1283, 1288 (9th Cir. 1997), overruled, in part, on other
3 grounds by, *Calderon v. United States Dist. Ct.*, 163 F.3d 530, 540 (9th Cir. 1998).
4 Tolling is appropriate when "extraordinary circumstances beyond a prisoner's control
5 make it impossible to file a petition on time." *Id.*; *see also*, *Miranda v. Castro*, 292 F.3d
6 1063, 1067 (9th Cir. 2002)(stating that "the threshold necessary to trigger equitable tolling
7 [under AEDPA] is very high, lest the exceptions swallow the rule.") (citations omitted);
8 *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). "When external forces, rather than a
9 petitioner's lack of diligence, account for the failure to file a timely claim, equitable
10 tolling of the statute of limitations may be appropriate." *Miles v. Prunty*, 187 F.3d 1104,
11 1107 (9th Cir. 1999). The extraordinary circumstances requirement is a "high hurdle," *see*
12 *Calderon*, 128 F.3d at 1289, and policy considerations counsel against equitable tolling.
13 *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). A petitioner seeking equitable tolling
14 must establish two elements: "(1) that he has been pursuing his rights diligently, and (2)
15 that some extraordinary circumstance stood in his way." *Pace*, 544 U.S. at 418. Petitioner
16 must also establish a "causal connection" between the extraordinary circumstance and his
17 failure to file a timely petition. *Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1061
18 (9th Cir. 2007).

19 C. Analysis

20 The Magistrate Judge finds that, pursuant to the AEDPA, the Petition filed in this
21 Court is untimely. Huff had until one year after the discovery of the factual predicate for
22 his claim to file his federal petition. Because the Ninth Circuit has held AEDPA's one-
23 year statute of limitations in § 2244(d)(1) applies to each claim in a habeas application on
24 an individual basis, *Mardesich v. Cate*, 668 F.3d 1164, 1171 (9th Cir. 2012), the
25 undersigned will review the claims individually to determine if any of the claims are
26 timely filed.

1. *Date of Discovery of Factual Predicate: Claims Based on Parole Revocation in 1985*

The factual predicate for the claims that Petitioner's parole was revoked in violation of due process (Ground One) and that the parole revocation was motivated by racial discrimination (Ground Three), were discoverable on the date Huff's parole was revoked, sometime in 1985. AEDPA's one-year time limit, however, did not begin to run against any state prisoner before the date of the Act's enactment. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1287 (9th Cir. 1997) (allowing § 2244(d)'s limitation period to commence before AEDPA's enactment would have an impermissible retroactive effect), *overruled in part on other grounds by Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc). Thus, for claims arising before the enactment of the AEDPA, Huff had 1 year from the effective date, April 24, 1996, to April 24, 1997, within which to file his petition. *Ford v. Pliler*, 590 F.3d 782, 784 (9th Cir. 2009); *Bryant*, 499 F.3d at 1058; *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Huff did not file his federal application until November 30, 2011. Thus, the statute of limitations on Petitioner's claims related to the revocation of parole in 1985 expired on April 24, 1997. In the absence of statutory or equitable tolling, these claims are untimely.

2. *Date of Discovery of Factual Predicate: Claims Based on Violation of Ex Post Facto Clause of the Constitution*

The remainder of Petitioner’s claims arises from the Arizona Board of Executive Clemency’s continued denial of parole since 1985 based on the application of new criteria due to vindictiveness, retaliation and discrimination (Ground Two) in violation of *ex post facto* laws (Grounds Three and Four), which resulted in Petitioner being subjected to “cruel and unusual punishment” (Ground Three).

Huff argues that, as a result of these violations, he was denied parole “52 times” over the last “27 years.” (Doc. 12, at 6) Petitioner also alleges that the new criteria being applied to his revocation hearings in violation of *ex post facto* principles became

1 applicable after 1987. Thus, the factual predicate of Petitioner's claims regarding parole
 2 revocation hearings occurring after 1985 could have been discovered with reasonable
 3 diligence as early as 1985 or 1986, and at the latest by 1987.³ Successive denials of
 4 parole which do not involve separate factual predicates do not warrant separate statute of
 5 limitations calculations.⁴ See e.g. *Carrillo v. Cate*, 2009 WL 2575888 *2 (S.D. Cal
 6 2009)("Where a prisoner alleges a change in policy constitutes an *ex post facto* law, each
 7 continued application of the same policy does not involve separate factual
 8 predicates.")(citing *Brown v. Georgia Bd. of Pardons & Paroles*, 335 F.3d 1259, 1261–
 9 62 (11th Cir.2003) and *McAleese v. Brennan*, 483 F.3d 206, 217–19 (3rd Cir. 2007));
 10 *Wolfel v. Timmerman-Cooper*, 2009 WL 330294 (S.D. Ohio 2009)(Noting both lack of
 11 authority supporting petitioner's argument that the continuing violation doctrine should
 12 apply in habeas corpus proceedings, as well as courts' reluctance to apply the continuing
 13 violation doctrine outside of Title VII claims); *Whitmore v. Miller*, 2011 WL 2746125
 14 (W.D. Oklahoma)(the ability to discover factual predicate, by definition, could not
 15 involve a "continuing" period of time); *but see Chavez v. Lewis*, 2012 WL 538242, *4
 16 (N.D. Cal 2012) (When facts established at a previous administrative decision form the
 17 basis of a denial of a more recent administrative decision, the factual predicate of claim is
 18 determined by the more recent administrative decision, not the earlier one). Accordingly,

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 20 ³ Petitioner alleges these violations occur at each denial of his application for
 21 parole, and has attached three exhibits concerning the Board's denial of parole at three
 22 recent hearings. (Doc. 1, Exs. 1-3) In the most recent denial, Petitioner states that the
 23 Board is not giving him credit for addressing his behavior, that the Board uses different
 24 reasons each time to deny parole, and the charge of "anger control" is false. (Doc. 1, Ex.
 3) Though it is possible that a new factual predicate for a claim arising out of a recent
 parole decision could be timely, the allegations raised by Petitioner regarding the most
 recent denial do not establish a new factual predicate because Petitioner argues that these
 violations have occurred throughout his entire history with the Board.

25 ⁴ Though Petitioner does not specifically argue that the continuing violations
 26 doctrine should be applied in this case, he does assert that "Petitioner is still presently
 27 suffering egregious pain, that does not reflect a period in time, 27 years ago entirely, but
 28 his complaint is encompassing conditions of 'today' in which those pains are ever
 present." (Doc. 12, at 5) Petitioner also states that he "continues to be affected in 2012,
 by those same proceedings, deemed unconstitutional." (Doc. 12, at 4) The undersigned
 construes these assertions as an argument for application of the continuing violations
 doctrine in this case.

1 the statute of limitations on Petitioner's claims related to the Board's continued denials of
2 parole based on new statutory criteria also expired on April 24, 1997, and in the absence
3 of statutory or equitable tolling, these claims are untimely.

4 3. Statutory Tolling

5 The filing of Petitioner's "informal petition" for relief with the Arizona Court of
6 Appeals in June, 2011, could not revive the statute of limitations because it had already
7 lapsed. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003). Neither did the
8 informal petition restart the limitations period. *See id.*

9 4. Equitable tolling

10 Petitioner asserts that he was "incarcerated at 16 years of age, in 4 different states .
11 . . with no access to Arizona law or guidelines laws pertaining to the AEDPA." Petitioner
12 asserts "it came 29 years after Petitioner was convicted." (Doc. 12, at 7) A petitioner's
13 *pro se* status, illiteracy, or unfamiliarity with the law do not, by themselves, constitute
14 grounds for failure to comply with AEDPS's 1-year statute of limitations. *See, Chaffer v.*
15 *Prosper*, 592 F.3d 1046, 1049 (9th Cir. 2010); *Raspberry v. Garcia*, 448 F.3d 1150, 1154
16 (9th Cir. 2006); *Donovan v. Maine*, 276 F.3d 87, 94 (1st Cir. 2002). Petitioner does not
17 explain how his age at the time of conviction in 1967 is causally connected to his failure
18 to file a timely habeas claim nearly 30 years later when the statute of limitations expired
19 in 1997. Furthermore, the absence of legal assistance or access to a law library also do
20 not warrant equitable tolling. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996) (holding that
21 there is no "freestanding right to a law library or legal assistance."). A petitioner's
22 inability to access information about the statute of limitations deadline, however, may
23 warrant equitable tolling. *See Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir.2000)
24 (en banc) (remanding case to district court for development of facts concerning whether
25 AEDPA materials were unavailable in the prison law library and the legal significance of
26 such a finding). A petitioner must demonstrate a causal connection between the
27 unavailability of case law in the prison library and the untimeliness of his habeas
28 petition," to be entitled to equitable tolling. *Bryant*, 499 F.3d at 1060.

The record as submitted in this case does not demonstrate that Petitioner had no

1 access to the AEDPA, or that a lack of access to other caselaw was causally connected to
2 the untimeliness of Huff's Petition. Though Petitioner alleges he was incarcerated in four
3 different states outside of Arizona, the relevant statute of limitations found in the AEDPA
4 is a federal statute, and, absent an allegation that Petitioner had no access to the AEDPA
5 after its enactment, Petitioner fails to raise an allegation of extraordinary circumstances
6 that would justify equitable tolling. Finally, Petitioner states, regarding the unavailability
7 of either the AEDPA or Arizona laws or guidelines, that they were "never made available
8 to the Petitioner. It came 29 years after Petitioner was convicted." It is not clear if
9 Petitioner is referring to the AEDPA coming 29 years after his conviction, or the
10 availability of relevant state laws. Regardless, Petitioner waited more than a decade after
11 this before filing this Petition, and thus has not demonstrated that he has been pursuing
12 his rights diligently. Accordingly, this Court finds no cause for equitably tolling the
13 limitations period in this case.

14 D. Other Pending Motions

15 Petitioner has filed an "Amendment to Complaint," (doc. 11), A "Request to Make
16 Supplemental Addition to Exhibits," (doc. 13), a letter requesting permission to allow
17 statements (doc. 15), a 'Request to Submit Letter for Filing Purposes,' (doc. 16), and a
18 "Request to Submit Psychological Report" (doc. 17).

19 Should the District Court adopt this Report and Recommendation and deny the
20 Petition as untimely, the Magistrate Judge recommends denying these requests as moot.
21 Should the District Court find the Petition timely, the Magistrate Judge recommends
22 referring these requests to the Magistrate Judge for further review.

23 **III. RECOMMENDATION**

24 This Court recommends that the District Court, after its independent review of the
25 record, DISMISS this action in its entirety as untimely and DENY all pending motions
26 and requests (Docs. 11, 13, 15, 16, 17) as MOOT.

27 Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections
28 within fourteen days after being served with a copy of this Report and Recommendation.
A party may respond to another party's objections within fourteen days after being served

1 with a copy thereof. Fed.R.Civ.P. 72(b).

2 If objections are not timely filed, then the parties' right to *de novo* review by the
3 District Court may be deemed waived.

4 If objections are filed the parties should use the following case number: **CV 11-
5 0773-TUC-FRZ**

6 **Dated this 11th day of September, 2012.**

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10 Bernardo P. Velasco
11 United States Magistrate Judge
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